No 391

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1944

RICHARD RICE, PETITIONER,

V.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR THE RESPONDENT.

WALTER R. JOHNSON,
Attorney General of Nebraska,
H. EMERSON KOELZER,
Deputy Attorney General of Nebraska,
ROBERT A. NELSON,
Assistant Attorney General of Nebraska,
Counsel for Respondent.

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Assistant Attorney General of Nebraska,
Counsel for Respondent.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

This case involves an application for a writ of habeas corpus made to the District Court of Lancaster County,

Nebraska. The petition was dismissed without the issuance of a writ and appeal taken to the Supreme Court of the State of Nebraska which affirmed the action of the lower court. Certiorari was granted by this court and the matter is now before the court on its merits.

NATURE AND STATEMENT OF CASE.

Counsel for petitioner has set forth in his statement of the case the allegations of the petition for a writ of habeas corpus. Since no hearing was had in this matter, and the relief, if any, to which petitioner is entitled must be based upon the facts set forth in his petition, we wish to review herein the facts pleaded, which it is contended show that the conviction and commitment of petitioner is without authority of law.

The errors relied upon and argued in petitioner's brief can be summarized under two points. The first contention being that petitioner was denied due process of law, as guaranteed by the Fourteenth Amendment to the Constitution, in that no counsel was appointed to represent him at the time he plead guilty before the trial court, and the second contention that petitioner, being an Indian, the crime for which he was tried and convicted is one for which he was subject to trial and penalty only in a federal court.

The petition alleges the following facts which have a bearing on the questions at issue: That on the 22nd day of May, 1940, an information was filed in the District Court of the Eighth Judicial District of Nebraska, in and for Thurston County, Nebraska, charging petitioner and one Joe Bigbear with breaking and entering into a certain dining hall in the Village of Winnebago, in Thurston

County, Nebraska, which said dining hall was owned by the Winnebago Indian Mission of the Reformed Church in America, with the intent of petitioner and the said Joe Bigbear to steal property of value contained in said building. The petition sets out in full the information filed by the county attorney of Thurston County, Nebraska (R. 3).

It is further alleged that petitioner is an Indian of the Winnebago Tribe, located in Thurston County, Nebraska (R. 2-6); that the crime was committed on an "Indian Reservation Government property without and beyond the jurisdiction of the trial court" (R. 5).

Petition then states that thereafter, on the 14th day of October, 1940, petitioner was arraigned in the District Court of Thurston County, Nebraska, and said petition discloses that petitioner entered a plea of guilty; that the court read to him the section of the statute defining the crime with which he was charged and fixing the penalty therefor and asked him if knowing what penalty could be imposed upon him he still desired to plead guilty. The petition sets forth in full the journal entry of the court with reference to such arraignment, which is as follows (R. 4-5):

"IN THE DISTRICT COURT OF THURSTON COUNTY, NEBRASKA.

"THE STATE OF NEBRASKA, Plaintiff vs. Dick Rice, Defendant.

"No. 5173 *JOURNAL ENTRY*. Now on this 14th day of October, A. D. 1940, the same being one of the Judicial days of the October, A. D. 1940, term of said court: Defendant having waived a prelim-

inary hearing in the county court and now being brought before the court for arraignment upon the information; this cause came on for hearing upon the information filed herein. The state appearing by said County Attorney and the Defendant appearing in person. The Defendant was thereupon arraigned upon the information filed herein for burglary and after the same was read to him in open court, and he was asked how he pled thereto, to which he replied, 'Guilty.' The court thereupon read Section 28-538, C. S. 1929, Nebraska, and asked the Defendant, if after knowing what penalty could be inflicted upon him under his plea of guilty, he still desired to plead guilty, to which question of the court, he replied in the affirmative.

"Whereupon the Defendant was asked if he had anything to say why judgment should not be passed upon him; the Defendant replied that he had nothing to say.

"The statement of the County Attorney was then read.

"The Court thereupon passed judgment and sentence of the court upon the defendant, as follows: It is the judgment and sentence of the Court that you be confined in the penitentiary of the State of Nebraska, at hard labor, no part of which shall be in solitary confinement and Sundays and holidays excepted as to hard labor, for a period of from one (1), to seven, (7), years, and pay the costs of prosecution, and that you be committed to the custody of the Sheriff of Thurston County, Nebraska, who will see that you are conveyed to the above institution for execution of this sentence, BY THE COURT: *MARK J. RYAN* DISTRICT JUDGE 'Filed October 14, 1940; Moris Rasmussen, Clerk Dist. Court.'"

Petitioner further alleges that the trial court did not advise petitioner of his constitutional rights to the assistance of counsel and witnesses for his defense; nor the right to be charged and informed of the nature and cause of the accused by indictment or presentment of a grand jury guaranteed by the Fourteenth, Fifth and Sixth Amendments to the Constitution of the United States; nor the right to trial by jury guaranteed by Article I, Section 6, of the Constitution of Nebraska (R. 8).

Petitioner incorporates in his petition a large number of conclusions charging the illegality of his trial. For example, it is alleged that his trial, conviction and commitment are "based on a swift, reckless sham and pretence of a trial" (R. 1); that he was "illegally, unlawfully without jurisdiction or authority of law arraigned in the District Court of Thurston County, Nebraska;" that the conviction of petitioner was "obtained by ordeal and mobocracy" (R. 7). These latter statements are mere conclusions of the pleader and cannot be considered unless they are borne out by the facts, as set forth in the petition.

SUMMARY OF POINTS AND ARGUMENT.

Point A. The constitutional right of the accused in a criminal case to have the assistance of counsel may be waived.

Point B. The determination of the Supreme Court of Nebraska that the trial and conviction of petitioner was not illegal under the state's constitution and laws may not be reviewed by the Supreme Court of the United States.

Point C. In prosecutions for crimes against state law the constitutional guarantees are those prescribed by state law, giving due regard to the Fourteenth Amendment to the Constitution of the United States forbidding the state to deprive the accused of life, liberty or property without due process of law.

Point D. An Indian who commits a crime on land within the boundaries of an Indian Reservation, but land to which the patent in fee has been issued, is subject to the jurisdiction of the courts of the state in which such land is located.

Point E. The ruling of a state court that a habeas corpus proceedings on the merits is conclusive in the matter therein contained, and that a second petition for habeas corpus, based upon the same reason and facts, is res judicata as to the second petition, does not violate the due process clause of the Fourteenth Amendment.

ARGUMENT.

Point A.

The Constitutional Right of the Accused in a Criminal Case to Have the Assistance of Counsel May be Waived.

Johnson v. *Zerbst*, (1938) 304 U. S. 458, 82 L. Ed. 1461, 58 Sup. Ct. 1019.

Zahn v. *Hudspeth*, (1939; C. C. A. 10th) 102 Fed. (2d) 759 (writ of certiorari denied in (1939) 307 U. S. 642, 83 L. Ed. 1522, 59 Sup. Ct. 1045).

Buckner v. *Hudspeth*, (1939; C. C. A. 10th) 105 Fed. (2d) 396 (writ of certiorari denied in

(1939) 308 U. S. 553, post, 465, 60 Sup. Ct. 99).

McCoy v. *Hudspeth*, (1939; C. C. A. 10th) 106 Fed. (2d) 810.

Wilson v. *Hudspeth*, (1939; C. C. A. 10th) 106 Fed. (2d) 812.

Cundiff v. *Nicholson*, (1939; C. C. A. 4th) 107 Fed. (2d) 162.

Towne v. *Hudspeth*, (1939; C. C. A. 10th) 108 Fed. (2d) 676.

McDonald v. *Hudspeth*, (1940; C. C. A. 10th) 108 Fed. (2d) 943.

Sedorko v. *Hudspeth*, (1940; C. C. A. 10th) 109 Fed. (2d) 475.

Cooke v. *Swope*, (1940; C. C. A. 9th) 109 Fed. (2d) 955.

Moore v. *Hudspeth*, (1940; C. C. A. 10th) 110 Fed. (2d) 386 (writ of certiorari denied in (1940) — U. S. —, post, —, 60 Sup. Ct. 1106).

Williams v. *Sanford*, (1940; C. C. A. 5th) 110 Fed. (2d) 526 (writ of certiorari denied in (1940) — U. S. —, post, —, 60 Sup. Ct. 1096).

Creel v. *Hudspeth*, (1940; C. C. A. 10th) 110 Fed. (2d) 762.

Pers v. *Hudspeth*, (1940; C. C. A. 10th) 110 Fed. (2d) 812.

Erwin v. *Sanford*, (1939; D. C.) 27 Fed. Supp. 892.

Parker v. *Johnston*, (1939; D. C.) 29 Fed. Supp. 829.

United States, ex rel. Coate v. *Hill*, (1939; D. C.) 29 Fed. Supp. 890.

Zewezubuck v. *Sanford*, (1939; D. C.) 32 Fed. Supp. 124.
Smythe v. *State*, 124 Neb. 267, 246 N. W. 261.

The right of an accused to have counsel appointed under the constitution and laws of the State of Nebraska is for the benefit of the accused, and, therefore, a right which may be waived. This also is true of the right to appointment of counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States, as shown by the authorities above set forth. While it is no doubt true that under certain circumstances the mere fact that the accused pleads guilty may not constitute an inelligent waiver of his right to counsel, a plea of guilty voluntarily made without any improper inducement and where no need for the assistance of counsel is disclosed, may properly be held to constitute a waiver of the appointment of counsel. The record in the instant case discloses that the plea of guilty was voluntarily made, the petition contains no allegation of any improper inducement, either on the part of the prosecuter, the court, or anyone else, but to the contrary the record of the court, which is made a part of the petition, discloses regularity in the proceedings in every manner. The judgment of a trial court of the State of Nebraska is entitled to a presumption of regularity. As stated in *Johnson* v. *Zerbst*, supra:

> "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity."

Point B.

The Determination of the Supreme Court of Nebraska That the Trial and Conviction of Petitioner Was Not Illegal Under the State's Constitution and Laws May Not be Reviewed by the Supreme Court of the United States.

This point has been repeatedly decided by this court, and scarcely requires any argument. In *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, it is stated:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

In *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 82 L. Ed. 1290, this court said:

> "The decision in Erie R. Co. v. Tompkins * * * settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court."

In *Smith* v. *O'Grady*, 312 U. S. 329, 61 Sup. Ct. 572, 85 L. Ed. 859, paragraph 1 of the syllabus provides as follows:

> "The determination of the highest court of a state that the imprisonment of a petitioner for a writ of habeas corpus is not illegal under the state's Constitution or laws may not be reviewed by the Supreme Court of the United States."

Petitioner contends that in his trial there was a violation of that part of Article I, Section 2 of the Constitution of the State of Nebraska which provides:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, * * *."

The Supreme Court of Nebraska, however, has ruled adversely to the petitioner as to this contention, and the matter is therefore not before this court for review. The inquiry is limited to whether or not the failure to appoint counsel at the preliminary hearing of the petitioner constituted a violation of the provisions of the Fourteenth Amendment to the Federal Constitution.

Point C.

In Prosecutions For Crimes Against State Law the Constitutional Guarantees Are Those Prescribed by State Law, Giving Due Regard to the Fourteenth Amendment to the Constitution of the United States Forbidding the State to Deprive the Accused of Life, Liberty or Property Without Due Process of Law.

The authorities dealing with the question of whether or not failure to appoint counsel for the accused constitutes a violation of the provisions of the Federal Constitution are too numerous to all be set forth herein. A few of the more important of such cases are as follows:

Garrison v. *Amrine*, 155 Kan. 509, 125 Pac. (2d) 228. (Certiorari denied, 63 Sup. Ct. 51, 87 L. Ed. 509.)

Gall v. *Grady*, 39 Fed. Supp. 504, 125 Fed. (2d) 253.

Powell v. *Alabama*, 287 U. S. 45, 53 Sup. Ct. 55,

77 L. Ed. 158, 84 A. L. R. 527.

McCall v. *State*, 136 Fla. 343, 186 So. 667.

Smith v. *O'Grady*, 312 U. S. 329, 61 Sup. Ct. 572, 85 L. Ed. 859.

Johnson v. *Zerbst*, 304 U. S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461.

Walker v. *Johnston*, 312 U. S. 275, 61 Sup. Ct. 574, 85 L. Ed. 830.

Holiday v. *Johnston*, 313 U. S. 342, 61 Sup. Ct. 1015, 85 L. Ed. 1392.

Lowvorn v. *Johnston*, 118 Fed. (2d) 704. (Certiorari denied, 314 U. S. 607, 62 Sup. Ct. 92, 86 L. Ed. 488.)

Betts v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595.

The above cases definitely establish that the Sixth Amendment to the Federal Constitution is not applicable to prosecutions for crimes against state law, but applies only to prosecutions by federal courts. In prosecutions under state law the constitutional guarantees are those prescribed by the State Constitution, giving due regard to the Fourteenth Amendment forbidding the state to deprive the accused of life, liberty or property without due process of law. This distinction must be kept in mind in analyzing the various cases dealing with the failure to appoint connsel for the accused, for as stated in *Betts* v. *Brady*, supra:

> "The phrase 'due process of law' formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights; and its asserted denial is to be tested, not as a matter of rule, but rather by an appraisal of the totality of the facts involved in the particular case."

The State of Nebraska has fully recognized the obligation placed upon it by the provisions of the Fourteenth Amendment to the Federal Constitution, and, through the enactment of constitutional and statutory safeguards, have amply assured an accused of due process of law.

Section 3, Article I, Constitution of Nebraska, provides:

> "No person shall be deprived of life, liberty, or property, without due process of law."

Section 11, Article I, Constitution of Nebraska, provides:

> "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Also, Section 29-1803, Revised Statutes of Nebraska 1943, provides for the appointment of counsel as follows:

> "When any person shall be indicted for an offense which is capital or punishable by imprisonment in the penitentiary, the court is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours. * * *"

It is also true, as suggested by counsel for petitioner, that in construing these constitutional and statutory provisions the Supreme Court of Nebraska has fully pro-

tected an accused in his right to be represented by counsel (Brief for Petitioner, pp. 19-24). This is fully demonstrated by the cases cited in petitioner's brief. *Smythe* v. *State*, 124 Neb. 267, 246 N. W. 461; *Bordeau* v. *State*, 125 Neb. 133, 249 N. W. 291; *Stagemeyer* v. *State*, 133 Neb. 9, 273 N. W. 824.

Counsel for petitioner suggests that it is difficult to reconcile with the above cases the failure to appoint counsel in the instant case. An analysis of the facts of the instant case, however, which we have set forth under the nature and statement of the case, pages 2 to 5 of this brief, discloses that such failure to appoint counsel is entirely consistent with the ruling in the cases above cited, as well as the holding of our court in the cases cited under Point A of this brief. While the petitioner alleges the conclusion that his trial was "based on a swift, reckless sham and pretence of a trial" (R. 4), that petitioner was "illegally, unlawfully without jurisdiction or authority of law arraigned in the District Court of Thurston County, Nebraska, tried and convicted in less than twenty (20) minutes" (R. 4), the facts show that petitioner was first informed against on the 22nd day of May, 1940 (R. 3), and that it was not until the 14th day of October, 1940, almost five months later, that he was arraigned before the district court and asked to plead to the information (R. 4). Following petitioner's plea of guilty, the court read Section 28-538, Compiled Statutes of Nebraska for 1929, the section under which he was informed against, and inquired of petitioner if after knowing what penalty could be inflicted upon him under his plea of guilty he still desired to plead guilty, to which question of the court he replied in the affirmative. Nowhere in the petition is there the least suggestion

that any threats or promises of immunity were made to the petitioner by either the prosecuting attorney, or the court, or anyone else, which caused him to plead guilty. Petitioner had almost five months to consider the matter from the time the information was filed against him until he was arraigned, and, when he appeared before the court stating he was guilty of the crime charged, certainly there was no need for the appointment of counsel. We have been unable to find any authority, either that cited by counsel for petitioner, or any other case which we have read, which have held that under similar circumstances the failure to appoint counsel constituted a denial of due process of law.

Two of the leading cases dealing with failure to appoint counsel in prosecutions for crimes committed against state law are *Powell* v. *Alabama*, supra, and *Smith* v. *O'Grady*, supra. A study of these cases will reveal, however, that in neither case was the mere failure to appoint counsel held to be a violation of due process, but this circumstance, together with all the other circumstances of the case, was held to deprive the defendant of due process.

In *Powell* v. *Alabama*, supra, it was held:

> "Failure to give reasonable time and opportunity to secure counsel prior to trial, to ignorant and illiterate youths, away from their families and friends, charged with a crime punishable with death, against whom popular hostility was so aroused that it was necessary to keep them closely confined and under military guard, infringes the due process clause of the Fourteenth Amendment."

Smith v. *O'Grady*, supra, was heard upon the allegations of the petition, which for the purpose of the hear-

ing had to be assumed to be true. With reference to these allegations, the court said:

> "For this petition presents a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty. The petitioner charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process; that because of deception by the state's representatives he had pleaded guilty to a charge punishable by twenty years to life imprisonment; that his request for the benefit and advice of counsel had been denied by the court; and that he had been rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel in order to challenge the procedure by regular processes of appeal. If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment."

In *Betts* v. *Brady*, supra, this court expressly held that the due process of law clause does not require that in every case, regardless of the circumstances, the state must furnish counsel to an accused who is without funds to employ counsel. In the opinion, the court said:

> "The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation

of the Fourteenth. Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

"The petitioner, in this instance, asks us, in effect, to apply a rule in the enforcement of the due process clause. He says the rule to be deduced from our former decisions is that, in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the state. Expressions in the opinions of this court lend color to the argument, but, as the petitioner admits, none of our decisions squarely adjudicates the questions now presented."

The only reason given by petitioner for need of counsel is that such counsel would have been able to convince the trial court that it was without jurisdiction to hear the cause because the crime involved was committed by an Indian without the jurisdiction of the court. The question of jurisdiction of this cause will be considered in our next point which will disclose that this contention of petitioner is without merit.

Unless this court declares that a defendant in a criminal case must have counsel thrust upon him, the trial court made no error in failure to appoint counsel.

Point D.

An Indian Who Commits a Crime on Land Within the Boundaries of an Indian Reservation, But on Land to Which the Patent in Fee Has Been Issued, is Subject to the Jurisdiction of the Courts of the State in Which Such Land is Located.

Petitioner states that the crime for which he was convicted "was committed on an Indian Reservation Government property without and beyond the jurisdiction of the trial court." This is a false statement of fact, the falsity of which the trial court was required to take judicial notice.

It is a fact, as set forth in brief for petitioner, that the entire County of Thurston is included within the original Omaha Reservation and that a part of said original Omaha Reservation was sold by the Omaha Tribe by a treaty, dated March 6, 1865 (14 U. S. Stat. at L. 676), and a reservation established for the Winnebago Tribe in the same year (14 U. S. Stat. at L. 671). This treaty is set out in full in the appendix herein. It is also correct that the Village of Winnebago is located within the boundaries of said Winnebago Reservation.

The trial court was required to take judicial notice of the fact that Thurston County is one of the bodies politic of the State of Nebraska, duly organized, created and existing under and by virtue of the laws of the State of Nebraska; that it has a county government which has

functioned for many years, a county seat and a courthouse; that it has courts duly constituted by the laws of the state exercising civil and criminal jurisdiction, coextensive with the boundaries of the county, a jurisdiction which has been exercised unchallenged for many years. The right of equal suffrage is granted to Indians throughout the county. The court was further required to take judicial notice of the fact that there is very little land in Thurston County which has not been patented in fee, *and particularly was the trial court required to take judicial notice of the fact that the Village of Winnebago is incorporated under the laws of the State of Nebraska and is located in its entirety upon land which has been patented in fee.*

Viewed in this light, the petition discloses that the crime was committed upon land patented in fee and that the building broken into was owned by the Winnebago Indian Mission of the Reformed Church in America (R. 3). The petition, therefore, contradicts itself and discloses the falsity of the statement of petitioner that the crime was committed on "Indian Reservation Government property." The jurisdiction of the Federal Government in Thurston County exists only as to such property held by the government, either as the direct owner, or in trust for the Indians, which is a very small part of Thurston County. As to the balance of the territory within Thurston County, which includes the entire Village of Winnebago, the jurisdiction of the state courts is exclusive, both as to civil and criminal matters.

Jurisdiction in this case is granted to the State of Nebraska by the provisions of Section 6 of the General Allotment Act, passed February 8, 1887, 25 U. S. C. A.

349. A copy of this act with its amendments is set forth in the appendix herein. The provision of said act "shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside" has been construed by this court in numerous cases.

One of the leading cases involving this question is *In re Albert Heff*, 197 U. S. 488, 49 L. Ed. 848, wherein this court discharged petitioner from imprisonment under a conviction in the United States District Court for the District of Kansas because of a lack of jurisdiction. This case held that Section 6 of the General Allotment Act, 25 U. S. C. A. 349, had the effect of taking away the federal jurisdiction and subjecting the Indians to the jurisdiction of the state court. After discussing various decisions upon the question, the opinion concludes:

> "But it is unnecessary to pursue this discussion further. We are of the opinion that, when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to, the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control, thus created, cannot be set aside at the instance of the government without the consent of the individual Indian and the state, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indians are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

Eugene Sol Louie v. *United States*, 274 Fed. 47, was a case wherein Louie, a Coeur d'Alene Indian, was tried,

convicted and sentenced in the District Court of Idaho for the murder of another Coeur d'Alene Indian, within the limits of the Coeur d'Alene Indian Reservation in Idaho. Louie held a patent in fee to certain lands in the Coeur d'Alene Reservation, issued to him under an act amendatory to Section 6, of the act of February 8, 1887, the General Allotment Act.

In reversing the lower court and sending the case back with instructions to discharge Louie, the Circuit Court of Appeals, among other things, said:

> "Inasmuch as patent was issued under the Act of May 8, 1906, amending section 6 of the Act of February 8, 1887 we think that Louie as an allottee became subject to the laws, civil and criminal, of the state in which he resided.
>
> "The fact that the land was situate within the limits or boundaries of an Indian reservation is immaterial, because the allottee of the fee-simple patent was expressly declared to be subject to the laws of the state within which the land is situated.
>
> * * *
>
> "At once we find a clear distinction between Celestine's Case and Louie's, in that the terms of the statute under which patent to Louie issued have made him 'subject to the laws, both civil and criminal, of the state or territory' in which he resides, whereas no such terms are found in the Celestine Case. Congress by its legislation has therefore, in a sense, abandoned its guardianship of Louie and has left him subject to all the privileges and burdens of one sui juris."

In *United States* v. *Kiya*, 126 Fed. 879, the defendant, a full-blooded Indian, was charged in the indictment with

the crime of rape upon the person of a full-blooded Indian girl, in the Devil's Lake Indian Reservation in North Dakota. A plea to the jurisdiction of the court was sustained.

In *Ex parte Savage*, 158 Fed. 205, petitioner was denied release in habeas corpus proceedings upon the ground that the judgment of the District Court of Oregon was conclusive on the question of jurisdiction and that the question could not be raised in a habeas corpus proceedings. However, Judge Pollock in the opinion discussed the question raised in this case. The first paragraph of the syllabus in said case is as follows:

> "Where lands have been allotted to Indians in severalty, as authorized by Act Cong. Feb. 8, 1887, c. 119, 24 Stat. 388, the Indians cease to be wards of the government, and become citizens of the United States and of the state in which they reside, and are therefore amenable to the criminal laws of the state and triable in the state, and not in the federal courts, unless the offense charged was committed within territory over which the United States has reserved the exclusive jurisdiction to its courts."

United States v. *Hall*, 171 Fed. 214, held that where an Indian Reservation had been broken up and a large part of it owned in trust by allottees or white men, who had obtained title from the allottee's heirs at law, such allottees became citizens of the state, and were not therefore subject to prosecution in the federal courts for carrying ardent spirits into the reservation in violation of Act of Congress, the regulation of the liquor traffic being within the exclusive jurisdiction of the state.

To the same effect has been the ruling of state courts. See *State* v. *Lott*, 21 Idaho 646, 123 Pac. 491; *In re Now-*

Ge-Zhuck, 69 Kan. 410, 76 Pac. 877; *State* v. *Smokalem*, 37 Wash. 91, 79 Pac. 603.

Counsel for petitioner cites two Nebraska cases wherein he states that the Supreme Court of Nebraska did not construe the Federal Penal Code as providing that all Indians committing a crime within or without the Indian Reservation might be subject to the jurisdiction of the state courts. So far as *Ex parte Cross*, 20 Neb. 417, 30 N. W. 428, is concerned, it is a sufficient answer to call the court's attention to the fact that this case was decided at the July term of the court in 1886, which was prior to the time that the General Allotment Act, 25 U. S. C. A. 349, was enacted.

Kitto v. *State*, 98 Neb. 164, 152 N. W. 380, involved the crime of assault by defendant and the court held that the crime not being one of those over which the federal court had retained jurisdiction it was within the jurisdiction of the courts of the state.

The authorities are in accord and reason and justice suggest that since petitioner is given equal protection under the laws of the State of Nebraska he is also subject to prosecution under the state laws for violation thereof.

Point E.

The Ruling of a State Court That a Habeas Corpus Proceedings on the Merits is Conclusive in the Matter Therein Contained, and that a Second Petition for Habeas Corpus, Based Upon the Same Reason and Facts, is Res Judicata as to the Second Petition Does

Not Violate the Due Process Clause of the Fourteenth Amendment.

Counsel for petitioner criticizes the Supreme Court of the State of Nebraska for holding in *Williams* v. *Olson*, 144 Neb. —, 16 N. W. (2d) 178, that the doctrine of res judicata may be applicable in cases of habeas corpus where there has been a hearing upon the merits in a former action and it affirmatively appears that a second petition is based upon the same reasons and facts. The syllabus of the court in said case provides as follows:

> "The denial of an application for and refusal to allow a writ of habeas corpus by the district court is a final order, affecting a substantial right made in a special proceeding which, in effect, terminates the action. Such final order is reviewable on appeal to this court.
>
> "The principle of res judicata applies in cases of habeas corpus where there has been a hearing upon the merits in a former action of the same kind, and where, in a second petition filed for a writ of habeas corpus, it affirmatively appears that such petition is based upon the same reasons and facts and does not contain a new state of facts different from that which existed at the time the first judgment was rendered.
>
> "The final adjudication in a habeas corpus proceeding is conclusive in the matters there determined, as against a subsequent application."

That the application of the principle of res judicata is not stated as a broad, general rule without limitations is fully disclosed by the opinion of the court, wherein they quote from a previous Nebraska decision as follows:

> "In State ex rel. Flippin v. Sievers, 102 Neb. 611, 168 N. W. 99, this court held: 'The principle of res

> judicata does not apply in cases of habeas corpus to a judgment discharging the prisoner, when such previous discharge was not upon the merits, * * * or where a new state of facts, warranting his restraint, is shown to exist, different from that which existed at the time the first judgment was rendered.'"

The court made the express finding that the petition therein was based upon the same statement of facts and reasons as were contained in the prior application and stated as follows:

> "An examination of the petition in the instant case discloses it affirmatively appears that the contention in the former proceeding was that the judgment of the sentencing court was void, setting forth the reasons. The same conditions, based upon the same reasons and facts, are made in the petition before the court in the instant case. Due to the conclusiveness of the former judgment and the application of the doctrine of res judicata, the merits of this controversy, having been once determined in a former action, as hereinbefore explained, are not for review in this court."

The Supreme Court of Nebraska has held in *Tail* v. *Olson*, 144 Neb. —, 14 N. W. (2d) 840, that the right to appeal exists in habeas corpus proceedings. In the opinion, it is stated:

> "The constitutionality and statutory right of appeal in habeas corpus proceedings is now given in most states, and it operates as a substitute for successive applications from court to court, or judge to judge, which the prisoner had a right to make at common law, in case his application was refused. Church, Habeas Corpus, 2d Ed., 590, sec. 389 b.

> Such successive applications are not appeals since each court and judge thereof exercises a primary jurisdiction. That procedure was always attended by some danger of injustice and hazard of hardship or expense to both the prisoner and the state. As a result legislative bodies including our own have substituted the right of appeal for the successive applications permissible at common law. Church, Habeas Corpus, 2d Ed. 601, sec. 389 g. In this connection, it is to be noted that the statute, Comp. St. 1929, sec. 29-2801, provides that the application shall be made to any one of the judges of the district court, and this court has held that 'An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined.' Gillard v. Clark, 105 Neb. 84, 179 N. W. 396, 397."

The correctness of the statement in the above quotation that in permitting successive applications "that procedure was always attended by some danger of injustice and hazard of hardship or expense to both the prisoner or the state" has become very apparent not only in the State of Nebraska, but throughout the entire nation. During the last few years, a large number of prisoners from the Nebraska State Penitentiary have proceeded to file petitions for habeas corpus in the district courts of the state and the United States District Courts, as well as making applications to file in the Circuit Court of Appeals, directly in the Supreme Court of the State of Nebraska, and several applications have been made to file original actions in this court. Some of these prisoners have filed ten or more successive applications in spite of the fact that full hearings have been granted in numerous cases and in none of these cases when a hearing has been granted has the allegation of wrongful detention

been established. These facts are well known to the Supreme Court of Nebraska and are matters of which they may take judicial notice. We believe that this court also may take judicial notice of the applications for certiorari made to this court, as well as the applications made to file original petitions in habeas corpus before this court.

We also believe that this court may also take judicial notice of the fact that although petitioners have represented themselves in these actions the pleadings and briefs in all of these cases are so similarly phrased, the only changes being that of names, dates, etc., that this would suggest that the petitions and briefs are all written by one man, and as set forth in the present petition, as well as in many others, petitioner has the assistance of a fellow prisoner.

We make these statements because we believe that justice demands that even in habeas corpus proceedings the courts must consider the rights of the state and of society, as well as the rights of the petitioner. We do not intend to state that the rules should be the hard and fast rules which may govern in other cases, but are willing to concede that every precaution should be taken to prevent the wrongful detention of any person, but if orderly government is to function there must be some limitation even in these cases.

Where a petitioner has been granted a hearing on the merits of his case and a determination thereof is made by a court of competent jurisdiction, and where the right of an appeal to the highest court of the state is authorized, we can find no sound basis for the contention that, applying the principle of res judicata when a second petition is presented, stating the same facts and the same

reasons, constitutes a denial of any of the fundamental rights of the petitioner. The state and society are entitled to this much protection from the courts.

CONCLUSION.

Petitioner has set forth numerous other grounds which he contends make his detention wrongful, such as the fact that he was not indicted by a grand jury, that he was not tried before a jury, and that he was given an indeterminate sentence although he had previously been convicted of a felony. These matters, however, have not been presented in the brief of counsel, and, since they are so completely without merit, we do not consider it necessary to discuss them here.

We submit that the petition filed herein fails to state any facts which disclose that petitioner is being wrongfully detained by the warden of the Nebraska State Penitentiary, but that to the contrary the petition discloses that he is lawfully being held as a prisoner in said penitentiary. For these reasons, and for all of the reasons set forth in this brief, the action of the Supreme Court of Nebraska in affirming the District Court of Lancaster County, Nebraska, herein should be affirmed and the petition for a writ of habeas corpus dismissed.

Respectfully submitted,
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H. EMERSON KOKJER,
Deputy Attorney General,

ROBERT A. NELSON,
Assistant Attorney General,
For Respondent.

APPENDIX.

14 Statutes at Large 671 contains the treaty with the Winnebago Indians of March 8, 1865, which is as follows:

"ANDREW JOHNSON,

"President of the United States of America,

"To all and singular to whom these presents shall come, Greeting:

"Whereas a Treaty was made and concluded at the city of Washington, in the District of Columbia, on the eighth day of March, in the year of our Lord one thousand eight hundred and sixty-five, by and between William P. Dole, Clark W. Thompson, and St. A. D. Balcombe, Commissioners, on the part of the United States, and Little Hill, Little Dacoria, Whirling Thunder, Young Prophet, Good Thunder, Young Crane, and White Breast, Chiefs of the Winnebago Tribe of Indians, on the part of said tribe of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to-wit:—

"ARTICLES OF TREATY made and concluded at Washington D. C., between the United States of America, by their Commissioners, Wm. P. Dole, C. W. Thompson, and St. A. D. Balcombe, and the Winnebago Tribe of Indians, by their chiefs Little Hill, Little Decoria, Whirling Thunder, Young Prophet, Good Thunder, and White Breast, on the 8th day of March, 1865.

"ARTICLE I. The Winnebago tribe of Indians hereby cede, sell, and convey to the United States all their right, title, and interest in and to their present reservation in the Territory of Dakota, at Usher's Landing, on the Missouri river, the metes and bounds whereof being on file in the Indian Department.

"ARTICLE II. In consideration of the foregoing cession, and the valuable improvements thereon, the United States agree to set apart for the occupation and future home of the Winnebago Indians, forever, all that certain tract or parcel of land ceded to the United States by the Omaha tribe of Indians on the sixth day of March, A. D. 1865, situated in the Territory of Nebraska, and described as follows, viz; Commencing at a point on the Missouri river four miles due south from the north boundary line of said reservation; thence west ten miles; thence south four miles; thence west to the western boundary line of the reservation; thence north to the northern boundary line; thence east to the Missouri river; and thence south along the river to the place of beginning.

"ARTICLE III. In further consideration of the foregoing cession, and in order that the Winnebagos may be as well situated as they were when they were moved from Minnesota, the United States agree to erect on their reservation, hereby set apart, a good steam saw-mill with a grist-mill attached, and to break and fence one hundred acres of land for each band, and supply them with seed, to sow and plant the same, and shall furnish them with two thousand dollars' worth of guns, sixty horses, one hundred cows, twenty yoke of oxen and wagons, two chains each, and five hundred dollars' worth of agricultural implements, in addition to those on the reserve hereby ceded.

"ARTICLE IV. The United States further agree to erect on said reservation an agency building, school-house, warehouse, and suitable buildings for the physician, interpreter, miller, engineer, carpenter, and blacksmith, and a house 18 by 24 feet, one and a half story high, well shingled and substantially finished, for each chief.

"ARTICLE V. The United States also stipulate and agree to remove the Winnebago Tribe of Indians

and their property to their new home, and to subsist the tribe one year after their arrival there.

"In testimony whereof, the said Wm. P. Dole, Clark W. Thompson, and St. A. D. Balcombe, Commissioners as aforesaid, and the undersigned chiefs and delegates of the Winnebago Tribe of Indians, have hereunto set their hands and seals, at the place and on the day hereinbefore written."

This treaty was accepted by the Senate of the United States with an amendment to Article III allowing the Indians four hundred horses instead of sixty.

25 U. S. C. A. 349, a part of the General Allotment Act passed February 8, 1887, and amended May 8, 1906, provides as follows:

"At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee simple patents all allottees to whom trust patents shall be

issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of sections 331 to 334, inclusive, 336, 341, 348 to 350, inclusive, and 381 shall not extend to any Indians in the former Indian Territory."

SUPREME COURT OF THE UNITED STATES.

No. 391.—October Term, 1944.

Richard Rice, Petitioner, *vs.* Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska.	On Writ of Certiorari to the Supreme Court of Nebraska.

[April 23, 1945.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner, an Indian, without benefit of counsel pleaded guilty to a charge of burglary in the District Court of Thurston County, Nebraska, and was sentenced to from one to seven years. He petitioned another state District Court for a writ of habeas corpus seeking release from the penitentiary on the grounds, among others,[1] that he had been deprived of his constitutional right of counsel, and that the state court lacked jurisdiction. He alleged that he was ignorant of the law, and that in preparing his petition he had no one to help him except a fellow inmate. Petitioner did not challenge the facts stated in the judgment entry, i. e., that, in the burglary proceedings, he was arraigned and pleaded guilty, that the burglary statute was read to him, and that he then reiterated his plea. He challenged the validity of the judgment, however, on the ground that, in violation of the Fourteenth Amendment, he had been deprived of due process of law in that the trial court failed to advise him of his constitutional rights to counsel and to call witnesses. Petitioner further alleged that he had not waived those rights by word or action. Finally, the petition alleged that the conviction was void because the alleged crime was committed on an Indian Reservation which was exclusively within federal jurisdiction.

The petition was dismissed by the state District Court, for lack of merit, without an answer, and without a hearing. Petitioner then moved to set aside the dismissal, repeating his allegations, and

[1] Allegations of the petition charging that the petitioner's imprisonment was illegal under state laws need not be set out, since those questions have been finally adjudicated by the state Supreme Court and are not subject to review here. Smith v. O'Grady, 312 U. S. 329, 330.

requesting the appointment of counsel to assist him. The motion was denied, and petitioner, again acting in his own behalf, appealed to the Supreme Court of Nebraska. That court, without requiring an answer, affirmed the District Court. — Neb. —. Because important constitutional rights are involved, we granted certiorari and oppointed counsel to represent petitioner. — U. S. —.

In affirming, the Nebraska Supreme Court stated that "It is not necessary that there be a formal waiver; and a waiver will ordinarily be implied where accused appears without counsel and fails to request that counsel be assigned to him, particularly where accused voluntarily pleads guilty." It is apparent that the court's affirmance did not rest on its statement that a plea of guilty "ordinarily implied" a waiver of the right to counsel, but upon a holding that such a plea "absolutely" and finally waives that right.[2] This is inconsistent with our interpretation of the scope of the Fourteenth Amendment.

Whatever inference of waiver could be drawn from the petitioner's plea of guilty is adequately answered by the uncontroverted statement in his petition that he did not waive the right either by word or action. This denial of waiver squarely raised a question of fact. The state Supreme Court resolved this disputed fact by drawing a conclusive implication from the petitioner's plea of guilty. This is the equivalent of a holding that one who voluntarily pleads guilty without the benefit of counsel has thereby competently waived his constitutional right to counsel, even though he may have sorely needed and been unable to obtain legal aid. A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel.[3] Whether all these conditions exist

[2] In discussing allegations of the petition other than the one relating to appointment of counsel, the state Supreme Court also quoted with approval a statement that "A plea of guilty admits all facts sufficiently pleaded, . . . operates as a waiver of any defense, and . . . with it, of course, the constitutional guarantees with the respect to the conduct of criminal prosecutions." The court therefore said that since the record affirmatively showed that the defendant had pleaded guilty, this absolutely waives this and all other preliminary steps in connection therewith, ..."

[3] Williams v. Kaiser, 323 U. S. 471; Tomkins v. Missouri, 323 U. S. 485; House v. Mayo, No. 921, decided February 5, 1945.

is a matter which must be determined by evidence where the facts are in dispute.

The petitioner's need for legal counsel in this case is strikingly emphasized by the allegation in his habeas corpus petition that the offense for which the state court convicted him was committed on a government Indian Reservation "without and beyond the jurisdiction of the Court." This raises an involved question of federal jurisdiction, posing a problem that is obviously beyond the capacity of even an intelligent and educated layman, and which clearly demands the counsel of experience and skill.

The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history. See *Worcester* v. *Georgia*, 6 Pet. 515; 1 Stat. 469; 4 Stat. 729. In the light of this historical background Congress in 1885 passed a comprehensive Act, 23 Stat. 362, 385, in order to fulfill "treaty stipulations with various Indian Tribes", specifically including the Winnebagoes, of which tribe the petitioner alleges he is a member. The last section of that Act subjects Indians who commit certain crimes, including burglary, to trial and punishment. The language there used to accomplish this purpose is that "all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 23 Stat. 385. This section now appears as Section 548 in Title 18, of the United States Code and the state Supreme Court has ruled that it gives Nebraska authority to try the petitioner. This construction of the section is not in accord with that heretofore given it by the Courts of Nebraska and other courts.[4] In argument before us, Nebraska does not rely on the state Supreme Court's construction of 18 U. S. C. 548. Instead it argues that petitioner's allegation that the crime was committed on an Indian Reservation is false, and that the state Supreme Court was required to take judicial knowledge of its falsity. It admits, however, that Thurston County, where the burglary was allegedly committed, is included within the original statutory boundaries of a

[4] Ex parte Cross, 20 Neb. 417, cf. Kitto v. State, 98 Neb. 164; State v. Campbell, 53 Minn. 354; People v. Daly, 212 N. Y. 183; United States v. Kagama, 118 U. S. 375.

federally created Indian Reservation, 14 Stat. 676, 14 Stat. 371, and that the village of Winnebago, where the alleged offense was committed, is located within the boundaries of the Winnebago Reservation. The village of Winnebago, it insists, has ceased to be a part of the Reservation because all the Indians have been given the full benefits of citizenship by Nebraska and because Winnebago is incorporated under the laws of Nebraska and is located entirely upon land which has been patented in fee. The facts upon which this contention rests are said to be those of which Nebraska Courts can take judicial knowledge. With these facts thus established, it is said that jurisdiction of Nebraska over this offense is conferred by Section 6 of the General Allotment Act passed in 1887, 24 Stat. 390, as amended, 34 Stat. 182. Assuming that all the facts urged by the State are correct, and that these Indian lands have been disposed of under this latter statute, the State finds support for its contention in this Court's interpretation of that Act in *In re Albert Heff*, 197 U. S. 488. But later cases have cast considerable doubt on what was said in the *Heff* decision. *United States* v. *Celestine*, 215 U. S. 278, 290-291; *Hallowell* v. *United States*, 221 U. S. 317, 323; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 314; *Donnelly* v. *United States*, 228 U. S. 243, 269-272; *United States* v. *Chavez*, 290 U. S. 357; *United States* v. *McGowan*, 302 U. S. 535, 539.

All of these questions concerning the power of the State Courts to try this Indian petitioner for burglary indicate the complexities of the problem he would have found had he attempted to defend himself on this ground. And a decision by the State Court that it had jurisdiction might or might not have finally determined the issue. Cf. *Toy Toy* v. *Hopkins*, 212 U. S. 542, 549, and *Bowen* v. *Johnston*, 306 U. S. 19.

We conclude that the petitioner is entitled to a hearing on his allegations that he did not, in the burglary proceedings, waive his constitutional right to have the benefit of counsel.

It has been suggested that even if the court below erred in holding that a plea of guilty is a conclusive waiver of the right to counsel, its judgment might be sustained on the ground that habeas corpus was not the proper remedy, or because the allegations of the petition lack sufficient definiteness. The very fact that the court considered the petition on its merits gives rise to a strong, if not conclusive, inference that the petition satisfied the state's procedural requirements in all respects. By treating this clumsily drawn petition with liberality, instead of dismissing it

because of a failure to comply with the precise niceties of technical procedure, the state Supreme Court acted in accordance with its traditional solicitude for the writ.[5] And this treatment is in line with federal practice. "A petition for *habeas corpus* ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice." *Holliday* v. *Johnston*, 313 U. S. 342, 350, 351.[6]

Since the State Court placed its judgment precisely on the absence of merit in the petition, we could not except by speculation, conclude that the petition failed to measure up to its procedural requirements.[7] For the reasons given, we hold that the allegations of the petition showed a prima facie violation of the petitioner's right to counsel.

Reversed.

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[5] "It must be conceded that the petition is not a skillfully drawn pleading, but as it was not attacked in the district court it must receive a liberal construction here. . . . Crocker made no appearance in the case, and the warrant was not set out in any of the pleadings. When attacked after judgment, the petition, though informal, must be held sufficient." Urban v. Brailey, 85 Nebraska Reports, 796, 798-99. "It has been held that the proper method of attacking the petition is by motion to quash the writ, and that insufficiency in the petition is waived unless that remedy be resorted to. (McGlennan v. Margowski, 90 Ind. 150.)" Nebraska Children's Home Society v. State, 57 Neb. 765, 769. See also Chase v. State, 93 Fla. 963; State *ex rel.* Chase v. Calvird, 324 Mo. 429; Stuart v. State, 36 Ariz. 28; State *ex rel.* Davis v. Hardie, 108 Fla. 133; Ex parte Tipton, 83 Cal. App. 742; Deaver v. State, 24 Ala. App. 377; McDowell v. Gould, 166 Ga. 670; Ex parte Tollison, 73 Okl. Cr. 38; People v. Cook County Super. Ct., 234 Ill. 186; Willis v. Bayles, 105 Ind. 363.

[6] See also Cochran v. Kansas, 316 U. S. 255; Bowen v. Johnston, 306 U. S. 19.

[7] See Smith v. O'Grady, *supra*; cf. United States v. Ju Toy, 198 U. S. 253, 261.

Mr. Justice FRANKFURTER, dissenting.

In view of the circumstances revealed by the record in this case and in the light of Nebraska's experience with petitions for *habeas corpus*, as laid before this Court by the Attorney General of Nebraska, the meager allegations of this petition for *habeas corpus* should preclude our attributing to the Supreme Court of Nebraska a disregard, in affirming a denial of the petition, of rights under the Constitution of the United States rather than a denial on allowable state grounds. Accordingly, I believe the judgment should be affirmed.

Mr. Justice ROBERTS and Mr. Justice JACKSON join in this view.